Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-95

In The

Supreme Court of the United States

October Term, 1987

GARY R. HAGEBUSH,
ROY E. SCHWASINGER,
Petitioners,

vs.

FIRST NATIONAL BANK OF OMAHA,
A Nebraska Banking Corporation,
Respondent.

GARY R. HAGEBUSH,
ROY E. SCHWASINGER,
Petitioners,

vs.

NEBRASKA STATE BAR ASSOCIATION,
KAY ORR, GOVERNOR,
Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

BRIEF OF RESPONDENT FIRST NATIONAL BANK OF OMAHA IN OPPOSITION

Prepared and Submitted By:
GERALDINE L. CLANTON

For: SCHMID, MOONEY & FREDERICK, P.C.
1800 First National Center
Omaha, Nebraska 68102
(402) 341-7100

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

Because Petitioners failed to perfect their appeal of the original Summary Judgment entered by the District Court of Douglas County, Nebraska, to the Supreme Court of Nebraska, The United States Supreme Court does not have jurisdiction to hear this appeal, and the appeal should be dismissed. Additionally, there is no federal question involved in this litigation, and no federal question was ever passed upon by a lower court.

PARTIES INVOLVED

The parties involved in this proceeding are Respondent-Appellee, First National Bank of Omaha, and Petitioners, Gary R. Hagebush and Roy E. Schwasinger. (Petitioners have apparently also consolidated this appeal with their appeal of *Hagebush and Schwasinger v. Nebraska State Bar Association and Kay Orr, Governor*).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	7
SUMMARY OF ARGUMENT	7
CONCLUSION	12
APPENDIX	App. 1

APPENDIX:

Order Granting Summary Judgment dated October 19, 1984 ..... App. 1

Report of Prehearing Conference Officer dated March 18, 1985 ..... App. 2

Order Overruling Motion to Set Aside and Vacate Judgment dated June 12, 1985 ..... App. 5

Disposition of Appeal by Supreme Court of Nebraska dated January 23, 1986 (See Petition for Writ of Certiorari at App. 1)

Opinion of the Supreme Court of Nebraska dated June 19, 1987 (See Petition for Writ of Certiorari at App. 1)

TABLE OF AUTHORITIES

Page

CASES:

Aetna Cas. & Sur. Co. v. Dickinson, 216 Neb. 660, 345 N.W.2d 9 (1984) 7, 9, 10

Emry v. American Honda Motor Co., 214 Neb. 435, 334 N.W.2d 786 (1983) 7, 9

Lincoln County v. Provident Loan & Investment Co., 147 Neb. 169, 22 N.W.2d 609 (1946) 7, 11

Miller Chemical Co., Inc. v. Tams, 211 Neb. 837, 320 N.W.2d 759 (1982) 7, 11

Sargent Feed & Grain Co. v. Anderson, 216 Neb. 421, 344 N.W.2d 59 (1984) 8, 12

State ex rel. Birdine v. Fuller, 216 Neb. 86, 341 N.W.2d 613 (1983) 8, 9

STATUTES:

Neb. Rev. Stat. § 25-1142 5

Neb. Rev. Stat. § 25-1143 5

Neb. Rev. Stat. § 25-1911 5

Neb. Rev. Stat. § 25-1912 (Reissue 1984) 2, 5, 8, 9

Neb. Rev. Stat. § 25-2001 (Reissue 1979) 3, 8, 9, 10

OPINIONS BELOW

Opinions of the District Court of Douglas County, Nebraska, and the Supreme Court of Nebraska.

———o———

STATEMENT OF JURISDICTION

Respondent-Appellee does not believe that the United States Supreme Court has proper jurisdiction for this appeal, and further, there is no federal question involved in this litigation.

———o———

STATEMENT OF THE CASE

This matter grows out of what was a very simple lawsuit filed in the District Court of Douglas County, Nebraska. In September of 1983, the First National Bank of Omaha (hereinafter referred to as "Bank") sued Hagebush and Schwasinger, Petitioners herein, on notes totaling $11,500.00. Petitioners, complaining that the Bank allegedly mistransferred a wire transfer of $2,452.04 to the wrong bank account in Canada, countersued the Bank for more than $53,000,000.00 in damages. Nebraska District Court Judge, James A. Buckley, dismissed the counterclaim.

It might be helpful at this point to note briefly the purpose of the wire transfer. In December 1982, Peti-

tioners had apparently asked the Bank to wire the sum of $2,452.04 to the account of Dyckes Sprinkler Co. at the Bank of Montreal to pay for some goods they had ordered for their company, Water Conservation Systems Co. When the Bank of Montreal received those funds, the Bank of Montreal credited the funds to the account of Dyckes Plastic Group because the owner of Dyckes Sprinkler Co. had authorized them to do so.

Judge Buckley determined that even though the Bank of Montreal credited the account of Dyckes Plastic Group rather than Dyckes Sprinkler Co., the goods were purchased from Dyckes Plastic Group. The goods had been paid for, and Mr. Schwasinger had actually picked up the goods himself. District Court Judge Buckley was satisfied that a mistransfer of funds had not occurred, and summary judgment was entered against Hagebush and Schwasinger on October 19, 1984.

Hagebush and Schwasinger failed to file a motion for new trial within ten (10) days of October 19, 1984, and *likewise failed to file a notice of appeal within thirty (30) days of October 19, 1984, as required by Nebraska Law.* Neb. Rev. Stat. § 25-1912 (Reissue 1984). Long after that time, Hagebush and Schwasinger filed a Motion to Set Aside and Vacate the Summary Judgment which was denied. This prompted the *first* appeal to the Nebraska Supreme Court in this matter.

Judge Harry A. Spencer, conference officer for the Nebraska Supreme Court, filed a conference report on March 18, 1985, and characterized this *first* appeal as frivolous and recommended dismissal. Judge Spencer also noted in his report that counsel for Hagebush and Sch-

wasinger conceded at the preconference hearing that his clients owed the money on the note. Judge Spencer also stated that he found no fraud or irregularity sufficient to bring this case within the ambit of *Neb. Rev. Stat.* § 25-2001 (Reissue 1979). Hagebush and Schwasinger subsequently dismissed their appeal.

Hagebush and Schwasinger later filed a *second* Motion to Vacate and Set Aside the Summary Judgment of October 19, 1984. That motion basically reiterated the same grounds as the *first* motion. Hagebush and Schwasinger complained that the Bank committed an enormity by showing in the caption of the case that it was a Nebraska Banking Corporation rather than a National Banking Corporation. This, of course, was simply a typographical error.

The law firm for the Bank represents many banks, most of which are Nebraska State Banks. The caption which includes a "Nebraska Banking Corportion" is simply a normal, standard heading. There was no question that Hagebush and Schwasinger knew that they were being sued by the institution to which they had given the notes, that the notes were due, and that the First National Bank of Omaha was still the owner and holder of the notes. Nevertheless, Hagebush and Schwasinger contined to allege that this inadvertent error or "irregularity" was sufficient to set aside the judgment.

In addition, Hagebush and Schwasinger alleged that the Bank used "fraudulent" affidavits to obtain the summary judgment. Prior to judgment being entered the Bank had submitted an affidavit of G. J. Dyckes. The statement that G. J. Dyckes was a shareholder in Dyckes

Plastic Group had been crossed out and initialed by G. J. Dycke. Regardless, Hagebush and Schwasinger alleged in their *second* Motion to Vacate the Judgment that the Bank had committed fraud because G. J. Dyckes was *not* a shareholder in Dyckes Plastic Group.

Apparently, Hagebush and Schwasinger proceeded on the theory that they did not know that this statement had been crossed out in the original affidavit; hence, they could not effectively argue their case. They failed to mention, however, that their counsel had an opportunity to examine the original affidavit at the summary judgment hearing and, again, when he had the Bill of Exceptions prepared for their *first* appeal. When he discovered that this allegation against the Bank was unfounded, he claimed that his copy of the affidavit was so light that the line drawn through that statement was not visible.

G. J. Dycke's affidavit was submitted to the trial court to explain to the Court why the Bank of Montreal apparently credited the wire transfer to the account of Dyckes Plastic Group rather than to the account of Dyckes Sprinkler Co. The fact that G. J. Dyckes was or was not a shareholder of Dyckes Plastic Group was irrelevant and immaterial to this action.

Hagebush and Schwasinger also alleged that they found some sort of discrepancy in the affidavit of Vance Peters. Vance Peters stated in his affidavit that he was the General Manager of Dyckes Plastic Group, but as Hagebush and Schwasinger pointed out, some of the invoices attached to his affidavit were from Dyckes Sprinkler Co., Ltd., rather than ~~Dyckes~~ Plastic Group. Hagebush and Schwasinger failed to mention that several letters

also attached to that same affidavit addressed Mr. Peters as the General Manager of Dyckes Plastic Group. In fact, some of those letters are from Roy Schwasinger to Vance Peters as "General Manager" of Dyckes Plastic Group.

Again, petitioners' *second* appeal was summarily dismissed by the Supreme Court of Nebraska. Thereafter, petitioners filed another Application to Set Aside and Vacate the Judgment in the District Court. The District Court overruled that Application, and the petitioners again undertook their *third* appeal to the Supreme Court of Nebraska. The Supreme Court held that there was no legally viable basis for such an appeal and the appeal was wholly frivolous. The *third* appeal was dismissed, and respondent was awarded the sum of $1,000.00 in attorney fees. In addition, all costs were taxed to the petitioners.

The latest ruling from the Nebraska Supreme Court has now been appealed to the United States Supreme Court. Petitioners are now alleging that there is a federal question involved in this litigation. We must emphasize, however, that there is no federal question, and no federal question was ever expressly passed upon by any court below. After the District Court of Douglas County, Nebraska, entered Summary Judgment on behalf of respondent, petitioners simply failed to comply with the most fundamental requirements of perfecting an appeal to the Supreme Court of Nebraska. *See, Neb. Rev. Stat.* § 25-1142, § 25-1143, § 25-1911, and § 25-1912. We contend that this Court has no jurisdiction of this appeal, the appeal itself is infirm, and the appeal should be dismissed.

In addition to the litigation mentioned above, it should also be noted that Hagebush and Schwasinger filed a similar action against the Bank, The United States of America and the State of Nebraska in the United States District Court for the District of Nebraska (CV-85-0-96). Each of the defendants filed a separate motion to dismiss based on jurisdictional grounds. Chief Judge Warren Urbom dismissed the complaint, and Hagebush and Schwasinger appealed to the 8th Circuit Court of Appeals. That appeal was also dismissed. (85-1726 NE).

Thereafter, Hagebush and Schwasinger brought another similar action in Federal Court against the United States of America, First National Bank of Omaha, Comptroller of the Currency, Internal Revenue Service, United States Department of Justice, Federal Bureau of Investigation, and the United States Attorney for the District of Nebraska. (CV-0-192). That case was also dismissed by the United States District Court Judge Lyle Strom. A lawsuit was later filed in the District Court of Douglas County, Nebraska, by Hagebush and Schwasinger against Judge Strom personally as a result of that action. (Doc. 855, Page 319). That case was dismissed on October 2, 1986.

It also appears that Hagebush and Schwasinger have filed an action against the Nebraska State Bar Association and the Governor of Nebraska, Kay Orr. Apparently, the Supreme Court of Nebraska ruled against Hagebush and Schwasinger in that action, and petitioners have appealed that ruling to this Court also.

This recitation hopefully will give the Court some of the flavor of these proceedings. The claims of Hage-

bush and Schwasinger have been knocked down at every juncture in both State and Federal Courts. Petitioners, seemingly out of frustration that their prior actions had failed, have now filed an appeal to the Supreme Court of the United States. We believe that this appeal is wasteful of the Court's time and the litigants' time.

———o———

STATEMENT OF FACTS

The Bank respectfully requests that the Statement of the Case also serve as the statement of facts.

———o———

SUMMARY OF ARGUMENT

A party which has secured a judgment is entitled to retain that judgment, and it may not be set aside in the absence of a sound legal reason for doing so. Only when a judgment is clearly shown to have been obtained by fraud or false testimony and when it would be against good conscience to enforce judgment and proper showing of due diligence is made will a judgment be vacated after the term in which it was rendered.

Aetna Cas. & Sur. Co. v. Dickinson, 216 Neb. 660, 345 N.W. 2d 9 (1984)

Emry v. American Honda Motor Co., 214 Neb. 435, 334 N.W.2d 786, 792 (1983)

Lincoln County v. Provident Loan & Investment Co., 147 Neb. 169, 22 N.W.2d 609 (1946)

Miller Chemical Co., Inc. v. Tams, 211 Neb. 837, 320 N.W. 2d 759 (1982)

Sargent Feed & Grain Co. v. Anderson, 216 Neb. 421, 344 N.W.2d 59 (1984)

State ex rel. Birdine v. Fuller, 216 Neb. 86, 341 N.W.2d 613 (1983)

There is no justification whatsoever for vacating the Summary Judgment entered against Hagebush and Schwashinger. The Judgment was entered on October 19, 1984. Hagebush and Schwasinger failed to file a Notice of Appeal with the Supreme Court of Nebraska within thirty (30) days of October 19, 1984 as required by Nebraska Law. *Neb. Rev. Stat.* § 25-1912 (Reissue 1984). Hagebush and Schwasinger then attempted to bring their case within the ambit of *Neb. Rev. Stat.* § 25-2001 (Reissue 1979) and filed a Motion to Set Aside and Vacate the Judgment on the grounds of fraud and irregularities. District Court Judge Buckley determined that no such fraud had occurred and overruled that motion. Hagebush and Schwasinger appeal to the Nebraska Supreme Court, but they subsequently dismissed that appeal after Judge Harry Spencer recommended that the appeal be dismissed because it was frivolous.

Hagebush and Schwasinger then filed a *second* Motion to Vacate and Set Aside the Summary Judgment of October 19, 1984, and again tried to bring themselves within the ambit of § 25-2001 by alleging irregularities and fraud on the part of the Bank. District Court Judge Paul Hickman carefully reviewed the Motion of Hagebush and Schwasinger and determined that there were no irregularities or fraud in obtaining the Judgment. Hagebush and Schwasinger again appealed to the Nebraska Supreme Court, and the *second* appeal was summarily dismissed.

Incredibly, Hagebush and Schwasinger then filed a *third* Motion to Vacate the Summary Judgment and, although no evidence whatsoever, either new or old, was presented by Hagebush and Schwasinger, they again raised the same issues that had been ruled on before. District Court Judge Paul Hickman dismissed this third motion under the Doctrine of Res Judicata, and Hagebush and Schwasinger filed their *third* appeal to the Nebraska Supreme Court. The *third* appeal was also summarily dismissed, and Hagebush and Schwasinger have now appealed to the United States Supreme Court.

According to *Neb. Rev. Stat.* § 25-1912 (Reissue 1984), a Judgment, when entered, becomes a final and binding Judgment from which an appeal has to be taken within one month or it is no longer subject to review. *Aetna Cas. & Sur. Co. v. Dickinson,* 216 Neb. 660, 345 N.W.2d 8 (1984). A court has no authority to vacate or modify a judgment after the final adjournment of the term of court at which it was rendered except for the reasons stated and within the time limited in *Neb. Rev. Stat.* § 25-2001. *State ex Rel. Birdine v. Fuller,* 216 Neb. 86, 341 N.W.2d 613 (1983), *Emry v. American Honda Motor Co., Inc.,* 214 Neb. 435, 334 N.W.2d 786, 792 (1983).

Hagebush and Schwasinger attempted several times to bring themselves within the provisions of § 25-2001, which provides:

> A District Court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made. . . (3) for a mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; (4) for fraud practiced by the successful party in obtaining the judgment or order; . . .

As District Court Judge Paul Hickman aptly stated in his Order dated June 12, 1985, the statute does *not* say "any" irregularity, but only "irregularity in obtaining the judgment or order." Hagebush and Schwasinger have raised as an irregularity the fact that the Bank styled itself a Nebraska Banking Corporation in the caption of its Petition when in fact it was a national banking corporation. While this may have been an inadvertent and harmless error, it is obviously not the type of irregularity which justifies the setting aside of a perfectly valid judgment.

The allegations regarding the Bank's affidavits are also completely without merit. The original affidavit of G. J. Dyckes clearly indicates that he crossed out and initialed the statement that he was a shareholder in Dyckes Plastic Group. Counsel for Hagebush and Schwasinger had an opportunity to examine the affidavit at the hearing for Summary Judgment, and furthermore, had several more opportunities to examine that affidavit when the Bill of Exceptions was prepared for the first appeal. Judgments after term cannot be set aside because of a party's own inadvertence or neglect. *See, Neb. Rev. Stat.* § 25-2001; *Aetna Casualty & Surety Co. v. Dickinson,* 216 Neb. 660, 345 N.W.2d 8 (1984). Also, their allegation has not the slightest bearing on the merits of the summary judgment.

The allegation that Vance Peters was not the General Manager of Dyckes Plastic Group is also without merit. A review of the correspondence between Hagebush and Schwasinger and Vance Peters which is attached to Vance Peters' Affidavit shows that this allegation is simply untrue.

Hagebush and Schwasinger submitted no evidence to support their last Motion to Set Aside the Judgment. They apparently still relied on pleadings and documents already scrutinized by the Nebraska District Court in prior hearings. The Nebraska Supreme Court, in reviewing the *third* appeal, decided that the decision of District Court Judge Paul Hickman on October 24, 1986 was clearly a correct decision. The Nebraska Supreme Court refused to set aside the Judgment of the District Court unless the decision was clearly wrong and not supported by evidence. *See, Miller Chemical Company, Inc. v. Tams,* 211 Neb. 837, 320 N.W.2d 759 (1982).

Hagebush and Schwasinger have conceded that they owed the money to the Bank. During this litigation, however, they have continued to comb the pleadings, affidavits, and other materials in this case searching for alleged "irregularities" in an attempt to have the summary judgment set aside. *Hagebush and Schwasinger have not offered the slightest defense to the actual merits of the case though.* That is because they have no defense.

Nebraska case law provides that only when a judgment is *clearly* shown to have been obtained by fraud or false testimony, and only when it would be against good conscience to enforce the judgment, will a judgment be vacated after term. *Lincoln County v. Provident Loan & Investment Co.,* 147 Neb. 169, 22 N.W.2d 609 (1946). As all of the Courts below have concluded, there is no legal basis for setting aside the summary judgment that was

entered on October 19, 1984. Hagebush and Schwasinger have had their day in court, and the Bank is entitled to retain the judgment. *See, Sargent Feed & Grain Co. v. Anderson,* 216 Neb. 421, 334 N.W.2d 59 (1984).

———o———

CONCLUSION

The judgment below may not be set aside in the absence of sound legal reason for doing so. Hagebush and Schwasinger have offered absolutely no defense to the merits of the case. They have not shown in any way that the judgment was obtained by fraud or false testimony. There is no federal question involved in this litigation.

The judgment, when entered, became a final and binding judgment one month after it was entered and is no longer subject to review.

This case, and particularly this appeal, clearly establishes how some litigants may "play games" with the courts. The "issues" in this case have not only been before the state court repeatedly, but they have also been submitted to the United States District Court twice and once to the Eighth Circuit Court of Appeals. We are now before the United States Supreme Court on an appeal of an untimely Motion to Vacate and Set Aside the Summary Judgment.

A repetition of actions in which the same issues are raised over and over should not be tolerated. Such a tactic breeds disrespect for law and unnecessarily adds to the caseload of an already overburdened judicial system.

For the foregoing reasons, we request that the appeal be dismissed.

DATED this 11th day of August, 1987.

Respectfully submitted:

FIRST NATIONAL BANK OF OMAHA
Respondent-Appellee,

By: /s/ GERALDINE L. CLANTON
GERALDINE L. CLANTON

For: SCHMID, MOONEY & FREDERICK, P.C.
1800 First National Center
Omaha, Nebraska 68102
(402) 341-7100

Attorneys for Respondent

APPENDIX

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

FIRST NATIONAL BANK OF OMAHA, A Nebraska Banking Corporation,	)	DOC. 831 NO. 565
Plaintiff,	)	
vs.	)	ORDER GRANTING SUMMARY JUDGMENT
GARY R. HAGEBUSH and ROY E. SCHWASINGER,	)	
Defendants.	)	

This matter came on to be heard on the 9th day of October 1984, on the motion of plaintiff, First National Bank of Omaha, for an order granting summary judgment against defendants, and each of them, on the ground that there is no genuine issue as to any material fact in this action and that plaintiff is entitled to judgment in its favor as a matter of law. Plaintiff appeared by its attorney, Geraldine L. Clanton, and defendants, Gary R. Hagebush and Roy E. Schwasinger, appeared by their attorney, Frank E. Robak, Sr. The Court having heard the arguments of counsel and having considered all the files, records, affidavits and all other papers and documents filed by the parties herein, and being duly advised in the premises.

IT IS HEREBY ORDERED that the motion of plaintiff, First National Bank of Omaha, for summary judgment against defendants, and each of them, be, and hereby

is, granted, and that summary judgment in the amount of $14,174.83, together with post-judgment interest, costs and disbursements of this action, be entered in favor of plaintiff, First National Bank of Omaha, and against defendants, Gary R. Hagebush and Roy E. Schwasinger, and each of them.

Dated this 19th day of October, 1984.

/s/ James A. Buckley
District Court Judge

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

FIRST NATIONAL BANK OF OMAHA, A Nebraska Banking Corporation,	)	NO. 85-156
Appellee,	)	REPORT OF PREHEARING CONFERENCE OFFICER (Filed March 18, 1985)
v.	)	
GARY R. HAGEBUSH,	)	
Appellant.	)	

This is an appeal from Douglas County from the denial of a Motion for set aside and vacate a judgment. The Honorable James A. Buckley was the presiding judge.

This was an action on a promissory note given to the First National Bank of Omaha which is a national bank but was described in the pleadings as a Nebraska Banking Corporation. Summary Judgment was rendered against the appellants and each of them on October 19, 1984. They

did not file a motion for a new trial within the time limited or attempt to appeal the judgment within the 30-day period. Rather, the appellants filed a motion to set aside and vacate the judgment, under 2502001 R.R.S. 1943. They claim relied under "(3) for mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment order; and (4) for fraud practice by the successful party in obtaining the judgment or order;"

Appellants are premising this appeal on the following contentions:

1. A motion for leave to amend the defendants' answer was sustained and at the same hearing, the Court immediately began to consider and subsequently granted the plaintiffs motion for summary judgment before the defendants were fully allowed to plead their answer.

2. That by falsely alleging itself to be a Nebraska Banking Corporation and suing under that premise, the appellee committed fraud which gives the appellants proper grounds to vacate and set aside the judgment pursuant to Section 25-2001.

The attorney for the appellants conceded his clients owed the money on the notes and would probably be held liable in another action.

By inadvertence, the action was filed by the First National Bank of Omaha as a Nebraska Banking Corporation rather than as a National Banking Corportion doing business in the State of Nebraska. However, the case proceeded to summary judgment without objection. There is no question the appellants knew they were being sued by

the instiutution to which they had given the note, that the note was due and the First National Bank was still the owner and holder of it.

In my judgment, there was no fraud or irregularity sufficient to bring this case within the ambit of Sec. 25-2001. Therefore, as the appellants failed to file a motion for a new trial or to appeal within 30 days from the rendition of the summary judgment, it has now become absolute. It is my recommendation this is a frivolous appeal and it should be dismissed.

In the event the Court permits the appeal to continue I have fixed the date for the filing of the bill of exceptions for April 23, 1985. I advised Mr. Robak, attorney for the appellants, it was his responsibility to notify the Court reporter. I have fixed the date for the filing of appellant's brief for May 23, 1985. I advised the attorneys for the parties, if this case went to oral argument I would not recommend more than 10 minutes to a side.

It is my recommendation this case be dismissed for the reason set out above. If it is not dismissed, it is my recommendation the oral arguments not exceed 10 minutes to a side.

Respectfully submitted,

/s/ Harry A. Spencer
Conference Officer

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

FIRST NATIONAL BANK OF OMAHA, A Nebraska Banking Corporation,	)	DOC. 831 NO. 565
Plaintiff,	)	
vs.	)	ORDER
GARY R. HAGEBUSH and ROY E. SCHWASINGER,	)	
Defendants.	)	

Hearing was held on Defendant Hagebush's Application to Set Aside Sheriff's Sale on June 11, 1985. Plaintiff appeared by Counsel Geraldine Clanton. Defendant Hagebush appeared by Counsel Frank Robak, Sr. Defendant Hagebush adduced no evidence. Plaintiff offered, and the Court received, Exhibit No. 1 (Affidavit of Geraldine L. Clanton). Arguments were made and the Court took the motion under advisement.

The Court now finds, based on the evidence, that on January 9, 1985 plaintiff's counsel by letter sent certified mail to Defendant Hagebush outlining to said defendant the homestead exemption procedure available to the defendant, but that after being notified twice of said letter, the defendant refused to take delivery of the letter. That a copy of said letter was delivered to defendant's attorney.

The Court further finds that plaintiff's Motion for Confirmation of Sale and Other Relief filed December 20, 1984 was allowed to be withdrawn by the plaintiff by the Court on January 2, 1985. The plaintiff's Further Motion

for Confirmation of Sale and Other Relief was filed on January 28, 1985 and the hearing was held on February 19, 1985. Substantially more than ten days had passed since the mailing of the letter to defendant on January 9, 1985 advising defendant of the homestead procedure. The fact that the letter of January 9, 1985 was mailed to defendant prior to the filing of the second motion to confirm the sale is of little moment, as plaintiff attempted to comply with Section 25-1531, R.R.S. 1943 (1984 Cum.Supp.). The plaintiff's obligation was met and defendant cannot take advantage of the fact that he did not receive the letter when he refused to pick it up at the post office. To hold otherwise would be an invitation to all judgment debtors to refuse delivery of certified mail. Had plaintiff not complied with the last sentence of Section 25-1531 this Court would be constrained to set aside the sale. The Court finds that Defendant Hagebush's Application to Set Aside the Sheriff's Sale was filed on the 60th day after the confirmation of sale and was within the 60 days allowed to file said motion; however, the defendant's own action in refusing to pick up said letter of January 9, 1985, coupled with his further action on January 18, 1985 as set forth in paragraph 4 of Exhibit No. 1 and the fact that the Notice attached to the Motion to Confirm Sale and Other Relief filed January 28, 1985 contained information relative to the statutes relating to the homestead exemption, leads this Court to the conclusion that Defendant Hagebush was advised of his homestead exemption rights. Plaintiff cannot be expected to do more than was done.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendants' Application to Set Aside Sheriff's Sale should be, and the same hereby is, overruled.

Hearing was also held on the defendants' Motion to Set Aside and Vacate Judgment, the basis for which is under Section 25-2001:

1. Any irregularity in obtaining judgment;

2. Fraud practiced by the successful party obtaining the judgment.

Section 25-2001, R.R.S. 1943, provides:

> "A district court shall have the power to vacate or modify its own judgments or orders after the term at which said judgments or orders were made * * * (3) for a mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; (4) for fraud practiced by the successful party in obtaining the judgment or order; * * *."

The Court sets out the pertinent provisions of the statute for the purpose of emphasizing that subsection (3) of the statute does not say "any" irregularity, but only "irregularity in obtaining the judgment or order."

Defendants raise as an irregularity in plaintiff's obtaining summary judgment against the defendants the fact that plaintiff alleged itself to be a Nebraska banking corporation when in fact the plaintiff is a national banking corporation. While this may be irregular and an inadvertent error on the part of plaintiff's counsel, it certainly is not the type of irregularity which would authorize this Court to set aside and vacate the judgment. See Conference Officer Harry A. Spencer's Report of Prehearing Conference Officer (Exhibit No. 6). Contrary to the allegation of paragraph 5 of defendants' motion, G. J. Dyck struck out paragraph 3 of his affidavit.

The Court has carefully reviewed the balance of defendants' motion and although defendants may have an independent action against the plaintiff for failing to follow certain instructions of the defendants in transmitting a check to Canada, no fraud by the plaintiff has been shown or proved.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendants' Motion to Set Aside and Vacate Judgment should be, and the same hereby is, overruled.

DATED this 12th day of June, 1985.

BY THE COURT:

/s/ (Illegible)
District Judge